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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1192

Paul Tackett, District Judge
of the First Judicial District
Sitting by Designation,
Petitioner,

vs.

State of New Mexico,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of New Mexico

ANTHONY J. ALBERT
Attorney for Petitioner
Gans Building,
P. O. Box 387,
Santa Fe, New Mexico 87501

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1967

No.....

Paul Tackett, District Judge
of the First Judicial District
Sitting by Designation,
Petitioner,

vs.

State of New Mexico,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of New Mexico

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of New Mexico made final by its order entered on November 3, 1967 (Exhibit 3, R. 95).

OPINION BELOW

The opinion of the Supreme Court of the State of New Mexico handed down on September 11, 1961 (Exhibit 1, R. 88), the denial of the motion for rehearing announced on September 24, 1967 (Exhibit 2, R. 110), and the order making the alternative writ of prohibition permanent entered on November 3, 1967 (Exhibit 3, R. 111), are attached to and by reference made a part of this petition.

The opinion of the Supreme Court of the State of New Mexico does not yet appear in the official reports. It is reported in the Pacific Reporter under the title and citation, State vs. Tackett, 432 P.2d 415.

JURISDICTION

The opinion of the Supreme Court of the State of New Mexico here sought to be reviewed (Exhibit 1, R. 88) was entered on September 11, 1967 and made final by the order entered on November 3, 1967 (Exhibit 3, R. 111).

Respondent's motion requesting a rehearing (R.96) was denied by order entered October 24, 1967 (Exhibit 2, R.110).

An order extending the time in which to petition for certiorari to and including March 4, 1968 was entered by the Honorable Justice Byron R. White of this Court on January 25, 1968.

This Court has jurisdiction to review the judgment of the Supreme Court of the State of New Mexico by writ of certiorari by virtue of the provisions of Title 28 of the United States Code, Section 1257.

28 United States Code, Section 1257 (3) provides that final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court:

> "By writ of certiorari, where the validity of a treaty or a statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

QUESTIONS PRESENTED

The questions presented for review in these proceedings which, it is submitted, were erroneously resolved by the Supreme Court of the State of New Mexico are:

(1) Whether a defendant in a State Court in New Mexico against whom an indictment has been returned is entitled, prior to trial, to require the disclosure of information, namely police reports, statements of witnesses and grand jury testimony which form the basis of the indictment against him.

(2) Whether the refusal to supply this information denies the defendant due process of law under the Fourteenth Amendment and the effective assistance of counsel under the Sixth Amendment to the Constitution of the United States.

The petitioner, the trial judge who presided in the criminal cases here involved, had entered orders directing that the information set out in sub-paragraph (1) above be furnished (R.8, 10, 11, 15, 16, 17, 21, 22, 23, 25, 29, 30, 31, 33, 37, 38.) but the Supreme Court of the State of New Mexico, in an original prohibition proceeding made permanent, by order entered November 3, 1967, its alternative writ prohibiting him from doing so.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Sixth and Fourteenth Amendments to the Constitution of the United States. Amendment VI provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

Section 1 of Amendment XIV provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

New Mexico has no statute relating to discovery in criminal cases.

STATEMENT OF THE CASE

This case involves a proceeding wherein the Supreme Court of the State of New Mexico in an original action, therein instituted by the district attorney of the First Judicial District, made permanent an alternative writ of prohibition directed to the petitioner herein, Paul Tackett, a district judge of the Second Judicial District, sitting by designation as a judge of the First Judicial District. By this action the New Mexico Supreme Court vacated and set aside the orders entered by the district judge directing the district attorney to furnish prior to trial to the moving defendants in ten separate criminal cases, respectively, the following information:

(1) A transcript of the testimony of each witness who testified before the grand jury as a result of which the indictment against the respective defendant was returned.

(2) A copy of the police report as to each respective defendant.

(3) A copy of all statements of witnesses in the possession of or under the control of the prosecuting attorney relating to the respective defendant.

The motions requesting this information, made both in writing and orally, were presented, argued and ruled on by the trial judge prior to arraignment. He concluded that the defendants were entitled to the information requested as a matter of law (R.8, 10, 11, 15, 16, 17, 21, 22, 23, 25, 29, 30, 31, 33, 37, 38) and ruled accordingly.

The criminal cases, originally affected by the trial court's orders and the prohibiting intervention of the State Supreme Court, were ten in number involving a total of twenty-one defendants. Since the trial court's ruling, however, dismissals have been entered as to fourteen defendants in six of the cases. Four cases remain on the docket; these relate to seven defendants and allege the offenses of aggravated burglary, aggravated battery, contributing to the delinquency of a minor and burglary.

The entire record which was before the Supreme Court of the State of New Mexico, including the briefs submitted, is now before this Court. The Constitutional aspects were presented before the trial judge and the State Supreme Court. When all is analyzed the question which emerges is obvious, simple and clear cut.

ARGUMENT

Rule 19(1) (a) gives as a reason which would engage the consideration of this Court in determining whether the granting of certiorari is warranted, the following:

> "Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with the applicable decisions of this court."

In New Mexico, as in practically all States, it is required by statute that the names of the witnesses testifying before the grand jury be endorsed upon the indictment (Section 41-6-47 New Mexico Statutes Annotated, 1953 Compilation). Likewise New Mexico also has a statute providing for the furnishing of a bill of particulars (Section 41-6-8 New Mexico Statutes Annotated, 1953 Compilation). These statutes are not set out verbatim for the reason that they have no direct relation to the question which was the subject of the trial court's ruling. As we have noted above, New Mexico has no statute relating to the precise question here presented.

In concluding that the Respondent was wrong in directing pretrial disclosure of the information sought, the New Mexico Supreme Court looked to other jurisdictions for assistance; stated the trial judge had not invoked an exercise of discretion —although had he predicated his ruling on that basis there is nothing to indicate the conclusion would have been otherwise; found an absence of any attempt to show "particularized need"; described the effort of counsel a "fishing expedition" and, finally, rejected what we conceive to be the true substance of this Court's holding in Giles vs. State of Maryland, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed.2d 737. However, the Court did sense the possibility of a violation of due process in its holding (432 P. 2d 415, 419, Exhibit 1, p. 17).

Various and conflicting views have been expressed over the years with respect to this troublesome problem. The early

and enlightened perspective demonstrated by Justice Marshall in United States vs. Burr, (1807) 4 Cranch 470, was lost sight of. His views arose out of his interpretation of Constitutional principles.

The dictum in the opinion of Chief Justice Vinson in United States vs. Reynolds, 345 U.S.1, 12, 97 L. Ed. 727, 73 S.Ct. 528, 32 ALR 2d 382, indicated a perception regarding discovery in criminal cases which has recently been developed.

The opinion of Justice Brennan in Palermo vs. United States, 360 U.S. 343, 362-363, 3 L.Ed. 2d. 1287, 79 S.Ct. 1217, indicates that consideration was given to Constitutional requirements in the decision in Jenks vs. United States, 353 U.S. 657, 1 L.Ed. 2d. 1103, 77 S.Ct. 1007. Cf. Rosenberg vs. United States, 360 U.S. 367, 3 L.Ed. 2d. 1304, 79 S.Ct. 1231.

Dennis vs. United States, 384 U.S. 855, 16 L.Ed. 2d 973, 86 S.Ct. 1840 permitted disclosure of the grand jury minutes under the fact situation there present. Attention is drawn also to the cases appearing in the footnotes to that case.

Brady vs. Maryland, 373 U.S. 83, 10 L.Ed. 2d 215, 83 S.Ct. 1194, points out that suppression of evidence favorable to the accused, particularly when it is requested and is material, violates due process.

The New Mexico Supreme Court refers to the statute respecting testimony given by witnesses before a grand jury (Section 41-5-30, New Mexico Statutes Annotated, 1953 Compilation). That statute, however, has no bearing on the question under consideration as its terms reflect.

Upon this petition for certiorari we have not undertaken to exhaust the authorities or to discuss any of the prolific treatises on the subject as we would assume the product of extensive research would be more welcome at a later stage in these proceedings assuming this Court sees fit to issue the writ.

On this question of due process we believe Giles vs. Maryland presents our strongest argument. The opinion of Justice Fortas clearly places the requirement of disclosure beyond the Rule (Rule 16 of the Rules of Criminal Procedure) and rests it upon the Constitutional grounds. The Constitutional re-

quirement seems to us also to be the basis for the views expressed by Justice Brennan and Justice White.

Strongly linked with the considerations already expressed is the question which arises with respect to the application of the Sixth Amendment. Can a defendant have the effective assistance of counsel in a situation where he is required to defend without first having an opportunity to determine fairly the nature and extent of the case he will be required to meet? Criminal proceedings in this respect should be removed from the category of a game of hide and seek. A defendant should be allowed to know in advance of trial what evidence he will be confronted with and thus be in a position to determine what, if any, defense is available to him. Disclosure, in our judgment, will have the effect of speeding up the administration of criminal justice and would certainly eliminate the necessity of trial in many instances.

Take for example the situation where counsel is appointed to represent an indigent defendant. (In the present case one defendant is represented by appointed counsel.) There are not the resources properly to investigate the case and in most instances, unfortunately, the client is denied the access to justice available to the affluent. This type of situation can in a measure be rectified only if counsel, prior to trial, has access to that information which the usually well equipped staff of investigators is able to obtain for the prosecution.

The effective assistance of counsel requires that a defendant's attorney have the same or at least an adequate opportunity to prepare and to present his client's case in a manner comparable to the prosecution; at least in the sense of evaluating the evidence. Denying to a defendant, whatever his financial status and ability to employ counsel, access to information such as the trial judge directed should be furnished in this case is, we submit, in the practical sense truly a denial of the effective assistance of counsel and consequently a denial of the Constitutional prerogative.

CONCLUSION

We sincerely hope that this Court will, in the exercise of its discretion, see fit to grant this petition for the issuance of the writ, and bring clarity to an area of confusion.

The effect of the decision of the Supreme Court of the State of New Mexico in this case has been felt in every judicial district in this State; it exerts a controlling influence on all criminal proceedings and if allowed to stand will seriously hamper the efforts of counsel properly to represent their clients in criminal cases. As we have pointed out, the New Mexico Court itself appears to have recognized the tenuous ground upon which it was treading when it referred to the possible violation of due process in the concluding portion of its opinion.

We have taken the liberty of indulging in brevity in the preparation of this petition; however, we believe it presents clearly the precise point involved. We shall undertake to discuss and to analyze at length the authorities, treatises and various articles available on the subject in the event this Court sees fit to take jurisdiction and issue the writ prayed for.

Respectfully submitted,

ANTHONY J. ALBERT
Attorney for Petitioner
Gans Building,
P. O. Box 387,
Santa Fe, New Mexico 87501

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Petitioner,

vs. No. 8438

PAUL TACKETT, District Judge
of the First Judicial District,
Sitting by Designation,

Respondent.

ORIGINAL PROHIBITION PROCEEDING

ALFONSO G. SANCHEZ, *District Attorney*
E. E. CHAVEZ
ARTHUR H. COLEMAN
Assistant District Attorneys
Santa Fe, New Mexico

Attorneys for Petitioner

BERTRAND B. PRINCE
ELAINE F. HATCH
EDWARD T. JOHNSON
ANTHONY J. ALBERT
JAMES B. THOMSON
Santa Fe, New Mexico

Attorneys for Respondent

EXHIBIT 1

OPINION

CARMODY, Justice.

The question before us in this original prohibition proceeding relates to the validity of the trial court's orders requiring the district attorney to furnish to various defendants testimony of witnesses given before a grand jury, police reports with respect to the alleged offenses, and statements of witnesses other than those of the respective defendants.

Respondent district judge was designated to preside in ten criminal cases, based upon grand jury indictments. Some of the defendants (but not all in the several cases in which there were multiple defendants) moved, prior to arraignment, for discovery of certain information and to require the furnishing of the transcript of the grand jury testimony of all witnesses who testified against the various moving defendants. The district attorney agreed to make available much of the requested information, such as a copy of any confessions or admissions, doctors' reports, copies of "rap sheets" of certain defendants, and to allow counsel for the defendant to view diagrams and physical demonstrative evidence, if any. However, the district attorney objected to furnishing (1) the grand jury testimony, (2) copies of police reports, and (3) written statements of the state's witnesses endorsed upon the indictment. The trial court ordered that the objected-to material be furnished, on the stated basis that "a defendant in a criminal case in New Mexico is entitled to same to enable him to prepare his defense and give him information he is entitled to under law . . . ."

At the same time as filing his answer to the writ, respondent, by motion, questioned the sufficiency of the petition on several grounds, most of which are concerned with the form of the petition and writ. With perhaps one exception, none of the attacks are such as could not easily be corrected, either by interlineation or the filing of a new case, and because of the state-wide importance of the problems involved, we hold that the petition and alternative writ sufficiently present the issues for our determination. The only ground that might have some merit is to the effect that the alternative writ interferes with the discretion of the trial court, and should therefore be quashed. As to this ground, it is unavailing, for it is apparent

that respondent considered that the defendants, as a matter of law, were entitled to the information, and it is obvious that no discretion was exercised. Compare Sproles v. McDonald, 1962, 70 N. M. 168, 372 P. 2d 122.

Proceeding, then, to the merits, we first consider whether, in advance of trial, those defendants who made the motions are entitled to a transcript of the testimony of all witnesses who testified before the grand jury with respect to the criminal charge out of which the indictments arose.

The New Mexico statute relating to the testimony of witnesses before a grand jury is § 41-5-30, N.M.S.A. 1953, and reads as follows:

> "A grand juror may, however, be required by the court, to disclose the testimony of any witnesses examined before the grand jury, for the purpose of ascertaining whether it is consistent with that given before them, by any other person, upon a charge against him for perjury, or in giving his testimony, or upon his trial thereof."

In State v. Morgan, 1960, 67 N. M. 287, 354 P. 2d 1002, we determined that where the prosecutor used grand jury testimony at the trial, the defendant should be permitted to examine the grand jury testimony of that witness for the purpose of cross-examination. We see no reason why the rule beyond that enunciated in Morgan should be extended and decline to do so. See also U. S. v. Tallmadge, 1907, 14 N. M. 293, 91 Pac. 729, 20 Ann. Cas. 46.

Although counsel strongly relies on Dennis v. United States, 384 U. S. 855, 16 L.Ed. 2d 973, 86 S. Ct. 1840, we do not construe that decision as requiring any other result than that which we now reach. In Dennis, the case was reversed because the petitioners there were denied the right *at the trial* to examine the grand jury testimony of four government witnesses. We would observe that the Dennis decision is in part based upon Rule 6 (e) of the Federal Rules of Criminal Procedure, which grants to the trial court power to direct disclosure of grand jury testimony "preliminarily to or in connection with a judicial proceeding." New Mexico has no comparable rule.

Two of our neighboring states have very recently ruled upon the question which we are considering. In State v. Faux, 1959, 9 Utah 2d 350, 345 P.2d 186, the Supreme Court of Utah, by a three-to-two decision, permitted pretrial examination of the grand jury testimony. This decision, however, loses a great deal of its force, not only because of the well-reasoned dissents but because of the differences between the Utah and the New Mexico statutes. We doubt if it is appropriate to announce in an opinion involving but one case such a radical departure from the age-old practice of grand jury secrecy which would apply to all criminal cases. Such a change should be made only after thorough study by the bench and bar of the constitutional and practical aspects of the basic fundamental questions involved. Apparently Utah, as is true in New Mexico, had not seen fit to adopt by rule a procedure applicable to all cases relaxing the rule of secrecy of grand jury proceedings such as has been done not only by Federal Rule of Criminal Procedure 6 (e) but in several states, including but not limited to Arizona, California and Missouri. See, 69 Yale L. J. 1149, 1184 (note 116) (1960).

In State v. Superior Court in and for the County of Maricopa, 1964, 95 Ariz. 319, 390 P.2d 109, the Supreme Court of Arizona, in a very thorough and exhaustive opinion on the subject, declined to allow defendants access to grand jury testimony on a wholesale basis, even though Arizona had, by rule, permitted a limited relaxation of the traditional principle of grand jury secrecy. The Arizona rule (Rule 107, 17 A.R.S. Rules of Criminal Procedure) permits the discovery of grand jury testimony under three circumstances, (1) after a witness has testified at the trial to determine if his testimony is consistent with that given before the grand jury, (2) where the witness is charged with perjury, and (3) when permitted by the court in furtherance of justice. The Arizona court approved of the "particularized need" interpretation and stated:

> "A 'particularized need' which in the furtherance of justice would authorize a trial judge to make available to the defendant a transcript of testimony, must be shown by facts and circumstances which demonstrate that unless such relief is forthcoming, the defendant will, in some manner, be prejudiced, or his legal rights adversely af-

fected. Under the law as it exists today, as set forth in this opinion, the defendant is not entitled to a transcript of testimony of any witness solely because he wants to find out what the witness said. To grant him such privilege is not in the 'furtherance of justice' because the public interest in preservation of secrecy out weighs the defendant's interest in discovery."

This statement has our approval, although we do not mean to imply that we are thereby adopting the Arizona rule. Here the defendants have failed to show any "particularized need" such as would justify making the grand jury transcript available. See also Pittsburgh Plate Glass Co. v. United States, 1959, 360 U. S. 395, 79 S. Ct. 1237, 3 L.Ed.2d 1323, which, as in the Dennis case, involved an application of Rule 6 (e) of the Federal Rules of Criminal Procedure.

We proceed to consideration of those portions of respondent's orders requiring the district attorney to furnish police reports and the statements of witnesses. Here, again, we believe the respondent has misconstrued the requirements of the law, for there is no showing of any unusual circumstances by which the defendants might be entitled to examine such reports and statements. It appears obvious that defense counsel wished to examine everything in the files, hoping by such a "fishing expedition" that something could be discovered. We do not believe that such a general request is sufficient justification for the trial court in entering the order which it did.

It is generally held that for an accused to be granted the right to inspect evidence in the possession of the prosecution, he must show something more than a mere desire for all the information obtained by the prosecution. See, State v. Superior Court, 1965, 106 N.H. 228, 7 A.L.R.3d 1, 208 A.2d 832; Rosier v. People, 1952, 126 Colo. 82, 247 P.2d 448; and Annot., 7 A.L.R.3d 8 § 7. In particular, production of the state's evidence is not allowed for exploratory purposes, People v. Leahey, 1960, 26 Misc. 2d 438, 207 N.Y.S.2d 619, or for the purpose of prying into the state's preparation of the case for trial, State v. Simon (Mo. 1964), 375 S.W.2d 102; State v. Aubuchon (Mo. 1964), 381 S.W.2d 807; People v. Calandrillo (1961), 29 Misc. 2d 491, 215 N.Y.S.2d 361. A defendant's motion for production must be based upon facts, not conclusions, State v. Brown, 1950, 360

Mo. 104, 227 S.W.2d 646, or mere surmise and conjecture, People v. Gatti, 1938, 167 Misc. 545, 4 N.Y.S.2d 130, and a blanket request will not be granted, because the defendant has no right to examine the state's evidence merely in the hope that something will turn up to aid him. State v. Wallace, 1965, 97 Ariz. 296, 399 P.2d 909; Walker v. Superior Court of Mendocino County, 1957, 155 Cal.App.2d 134, 317 P.2d 130; Rosier v. People, supra; State v. Stump, 1963, 254 Iowa 1181, 119 N.W.2d 210, cert. den. 375 U.S. 853, 11 L.Ed.2d 80, 84 S.Ct. 113; State ex rel. Keast v. District Court of Fourth Judicial Dist., 1959, 135 Mont. 545, 342 P.2d 1071; Linder v. State, 1953, 156 Neb. 504, 56 N.W.2d 734; State v. Goldberg, 1964, 261 N.C. 181, 134 S.E.2d 334, cert. den. 377 U.S. 978, 12 L.Ed.2d 747, 84 S.Ct. 1884; and Melchor v. State (1965, Okla. Crim.), 404 P.2d 63.

The rule is well stated in State v. Wallace, supra, wherein the court quoted from State ex rel. Mahoney v. Superior Court of Maricopa County, 1954, 78 Ariz. 74, 275 P.2d 887, 890, as follows:

> "The defense has no right to go upon a tour of investigation, in the hope that they will find something to aid them, . . . and if it appears that the request for such inspection is merely 'a fishing expedition to see what may turn up' it should be denied."

See also State v. McCall (Fla. 1966), 186 So.2d 324, and State v. Dickson, 1965, 248 La. 500, 180 So.2d 403.

Two recent New Mexico cases, Trimble v. State, 1965, 75 N.M. 183, 402 P.2d 162, and State v. Gomez, 1965, 75 N.M. 545, 408 P.2d 48, concerned matters occurring at trial and are therefore not applicable.

We are not unmindful of recent cases from the Supreme Court of the United States, i.e., Brady v. Maryland, 1963, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194; Giles v. Maryland, 1967, 386 U.S. 66, 17 L.Ed.2d 737, 87 S.Ct. 793; and Miller v. Pate, 1967, 386 U.S. 1, 17 L.Ed.2d 690, 87 S.Ct. 785, and fully realize the burden under which the prosecution is placed, should it later be discovered that there had been a suppression of evidence which would have materially aided a defendant's case. Compare, State v. Morris, 1961, 69 N.M. 244, 365 P.2d 668.

The necessity for the adoption in New Mexico of a rule somewhat similar to Rule 16, Federal Rules of Criminal Procedure, becomes apparent because of the ramifications of the above-mentioned decisions as to possible violations of the due process clause. However, we agree with Mr. Justice Harlan in his dissent in Giles v. Maryland, supra, wherein he said, with three other justices concurring:

> "Issues of the obligatory disclosure of information ultimately raise fundamental questions of the proper nature and characteristics of the criminal trial. These questions surely are entirely too important for this Court to implant in our laws by constitutional decree answers which, without full study, might appear warranted in a particular case. There are few areas which call more for prudent experimentation and continuing study."

The alternative writ heretofore issued will be made permanent. IT IS SO ORDERED.

DAVID N. CARMODY,
Justice

WE CONCUR:
FOUR SIGS

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Monday, September 11, 1967

No. 8438

STATE OF NEW MEXICO,
Petitioner,
vs.
PAUL TACKETT, District Judge of the First Judicial District Sitting by Designation,
Respondent.

ORIGINAL PROHIBITION PROCEEDING

This cause having heretofore been argued, submitted and taken under advisement, and the Court being sufficiently ad-

vised in the premises announces its decision by Mr. Justice Carmody, Chief Justice Chavez, Mr. Justice Noble, Mr. Justice Moise and Mr. Justice Compton concurring, making permanent an alternative writ of Prohibition for the reasons given in the opinion of the Court on file;

NOW, THEREFORE, IT IS CONSIDERED, ORDERED AND ADJUDGED by the Court that the Alternative Writ of Prohibition heretofore issued herein on May 5, 1967, be and the same is hereby made permanent.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Tuesday, October 24, 1967

No. 8438

STATE OF NEW MEXICO,

Petitioner,

vs.

ORIGINAL PROHIBITION PROCEEDING

PAUL TACKETT, District Judge
of the First Judicial District
Sitting by Designation,

Respondent.

This cause coming on for hearing upon Respondent's motion for a rehearing, and the Court having considered said motion and brief of counsel, and being now sufficiently advised in the premises.

IT IS ORDERED that said motion for rehearing be and the same is hereby denied.

EXHIBIT 2

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Friday, November 3, 1967

No. 8438

STATE OF NEW MEXICO,

Petitioner,

vs.

ORIGINAL PROHIBITION PROCEEDING

PAUL TACKETT, District Judge of the First Judicial District Sitting by Designation,

Respondent.

This ccause having heretofore been argued, submitted and taken under advisement, and an opinion of the Court having been handed down on the 11th day of September, 1967, and motion for rehearing having been filed by Respondent, and denied on October 24, 1967;

IT IS THEREFORE ORDERED that the Order of the Court entered herein on the 11th day of September, 1967, making the alternative writ of prohibition permanent, be and the same is hereby made final.

EXHIBIT 3

LIBRARY
SUPREME COURT, U. S.

FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1192

PAUL TACKETT, District Judge of the First Judicial District Sitting by Designation, *Petitioner,*

v.

STATE OF NEW MEXICO, *Respondent.*

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

BOSTON E. WITT
Attorney General for the State of New Mexico

JAMES V. NOBLE
Assistant Attorney General State of New Mexico

Attorneys for Respondent State of New Mexico.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1192

PAUL TACKETT, District Judge of the First Judicial District Sitting by Designation, *Petitioner,*

v.

STATE OF NEW MEXICO, *Respondent.*

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

Respondent herein prays that the Petition for a Writ of Certiorari to the Supreme Court of the State of New Mexico from an order entered by it on November 3, 1967, be denied.

QUESTIONS PRESENTED

(1) Whether a defendant in a State Court in New Mexico against whom an indictment has been returned is entitled, prior to trial, to require the disclosure of information, namely police reports, statements of witnesses and grand jury testimony which form the basis of the indictment against him.

(2) Whether the refusal to supply this information denies the defendant due process of law under the Fourteenth Amendment and the effective assistance of counsel under the Sixth Amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Article VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

Article XIV, Section 1, Constitution of the United States:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The following Constitutional provisions of the State of New Mexico are not referred to by Petitioner, and Respondent believes them to be pertinent.

Constitution of the State of New Mexico

Article II, Section 14:

"*No person shall be held to answer* for a capital, felonious or infamous crime *unless on* a presentment *or indictment* of a grand jury or information filed by a district attorney general or their deputies, except in cases arising in the militia when in actual service in time of war or public danger. No person shall be so held on information without having had a preliminary examination before an examining magistrate, or having waived such preliminary examination.

A grand jury shall be composed of such number, not less than twelve, as may be prescribed by law. Citizens only, residing in the county for which a grand jury may be convened and qualified as prescribed by law, may serve on a grand jury.

Concurrence necessary for the finding of an indictment by a grand jury shall be prescribed by law; provided, such concurrence shall never be by less than a majority of those who compose a grand jury, and, provided, at least eight must concur in finding an indictment when a grand jury is composed of twelve in number. Until otherwise prescribed by law a grand jury shall be composed of twelve in number of which eight must concur in finding an indictment. A grand jury shall be convened upon order of a judge of a court empowered to try and determine cases of capital,

felonious or infamous crimes at such times as to him shall be deemed necessary, or a grand jury shall be ordered to convene by such judge upon the filing of a petition therefor signed by not less than seventy-five resident taxpayers of the county, or a grand jury may be convened in any additional manner as may be prescribed by law.

In all criminal prosecutions, the accused shall have the right to appear and defend himself in person, and by counsel; to demand the nature and cause of the accusation; to be confronted with the witnesses against him; to have the charge and testimony interpreted to him in a language that he understands; to have compulsory process to compel the attendance of necessary witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed. (As amended November 4, 1924, effective January 1, 1925.)." (Emphasis added).

Statutes of the State of New Mexico

Sections 41-5-17, 41-5-24, 41-5-30, 41-6-8, and 41-6-47, N.M.S.A., 1953 Compilation, as amended, are as follows:

"41-5-17. Inquiry into public offenses—Indictments.—The grand jury have power, and it is their duty to inquire into all public offenses committed or triable in the county, and to present them to the court, by indictment."

"41-5-24. Advice of court and court officers—Officials barred from attendance at final deliberations.—The grand jury may, at all reasonable times, ask the advice of the court, the attorney general or the district attorney of the county, and whenever required by the grand jury, it shall be the duty of the district attorney of the county to attend them for the purpose of framing indictments, or of examining witnesses in their presence,

but no district attorney, sheriff or other person shall be permitted to be present during the expression of opinions, or giving of their votes upon any matters before them." (Emphasis added).

"41-5-30. Disclosure of testimony of witness in trial for perjury.—A grand juror may, however, be required by the court, to disclose the testimony of any witnesses examined before the grand jury, for the purpose of ascertaining whether it is consistent with that given before them, by any other person, upon a charge against him for perjury, or in giving his testimony, or upon his trial thereof."

"41-6-8. Bills of particulars.—(1) When an indictment or information charges an offense in accordance with the provision of section 42-607 (41-6-7), but fails to inform the defendant of the particulars of the offense sufficiently to enable him to prepare his defense, or to give him such information as he is entitled to under the Constitution of this state, the court may, of its own motion, and shall, at the request of the defendant, order the district attorney to furnish a bill of particulars containing such information as may be necessary for these purposes; or the district attorney may of his own motion furnish such bill of particulars.

(2) When the court deems it to be in the interest of justice that facts not set out in the indictment or information or in any previous bill of particulars should be furnished to the defendant, it may order the district attorney to furnish a bill of particulars containing such facts. In determining whether such facts and, if so, what facts, should be so furnished, the court shall consider the whole record and the entire course of the proceedings against the defendant.

(3) Supplemental bills of particulars or a new bill may be ordered by the court or furnished voluntarily under the conditions above stated.

(4) Each supplemental bill shall operate to amend any and all previous bills and a new bill shall supersede any previous bill.

(5) When any bill of particulars is furnished it shall be filed of record and a copy of such bill given to the defendant upon his request."

"41-6-47. Names of witnesses to be endorsed on indictment or information.—When an *indictment* or information is filed, *the names of all the witnesses* or deponents on whose evidence the indictment or information was based *shall be endorsed thereon* before it is presented, and the district attorney shall endorse on the indictment or information at such time as the court may by rule or otherwise prescribe the names of such other witnesses as he purposes to call. A failure to so endorse the said names shall not affect the validity or insufficiency of the indictment or information, but the court in which the indictment or information was filed, shall, upon application of the defendant, direct the names of such witnesses to be endorsed. No continuance shall be allowed because of the failure to endorse any of the said names unless such application was made at the earliest opportunity and then only if a continuance is necessary in the interest of justice." (Emphasis added.)

STATEMENT

Respondent does not object to Petitioner's Statement of the Case, but believes the following matters are pertinent for adequate consideration by the Court.

Respondent points out that the grand jury minutes requested by Petitioner were not transcribed and that Respondent did not intend to have them transcribed for its use. (R. 40, 43—Finding IV) Respondent points out that Petitioners, except for one, were not indigent but that the demand, for copies of the minutes, called for Respondent to pay the expense thereof.

(R. 40, 43—Finding III) Respondent points out that the Respondent did not have in its possession or under its control, the police reports and statements requested. (R. 40, 43—Finding IV) Respondent points out that the names of the witnesses were endorsed on the indictment and no claim is made that they were unavailable to Petitioner. All of the above is set forth in the motions of Petitioner in the New Mexico State District Court and in the Alternative Writ of Prohibition granted by the New Mexico Supreme Court.

ARGUMENT

Respondent does not believe that a substantial Federal question is presented. Petitioner contends that the statutes of New Mexico as set forth above are not relevant. Respondent respectfully submits that they are relevant and in point and show that Petitioners had adequate protection of their rights under the Sixth and Fourteenth Amendments to the United States Constitution. Respondent believes that this is so clear that further argument and briefs are unnecessary and that the correctness of the decision of the Supreme Court of the State of New Mexico is clear. *State* v. *Tackett*, —— N.M. ——, 432 P. 2d 415.

First, Respondent respectfully disagrees with Petitioner's statement that the law in New Mexico is not clear. The case of *State* v. *Morgan* (1960), 67 N.M. 287, 354 P. 2d 1002, points out the right of a defendant to examine the testimony of witnesses before a grand jury in order to impeach him during the trial. The Court there reviewed the basis for secrecy of grand jury proceedings and concluded that the privilege of the witness vanished when he testified and that his testimony could then be examined for purposes of impeachment. No such basis is presented in Petitioner's

request here to be allowed to go on a "fishing expedition."

Secondly, any details sought by Petitioner can be obtained by means of bills of particulars. (Section 41-6-8, N.M.S.A., 1953 Compilation) There is no showing that sufficient particulars cannot be so obtained so as to fully inform Petitioners of any matters pertinent to their defense.

Thirdly, the Petitioners do not show that they were unable to gain access to the witnesses whose names are entered on the indictments. (Section 41-6-47, N.M.S.A., 1953 Compilation) In substance Petitioners seek to have the State do their work for them.

Fourthly, there is no claim or showing that there is any supression of evidence that would materially aid the cases of Petitioners.

Fifthly, the Court specifically found that the statements and reports sought by Petitioners were not in the possession or control of Respondent and this is not attacked. (R. 40, 43)

Sixthly, it appears that the grand jury testimony sought is not transcribed and there is no intention on the part of Respondent to have it transcribed. (R. 40, 43)

Finally, by law, the Respondent was specifically excluded from the deliberations of the grand jury from which the indictment issued and there is no showing that Respondent knows what testimony or portions thereof were relied upon by the grand jury in returning the indictment. (Section 41-5-24, N.M.S.A., 1953 Compilation.)

Respondent's knowledge is limited to the names of witnesses endorsed on the indictment by the grand jury,

and its investigation of their evidence, which is equally available to the Petitioners.

CONCLUSION

Petitioner's questions have been presented. It is clear that there is no denial of any right to Petitioners under either the Sixth Amendment or the Fourteenth Amendment to the Constitution of the United States. There is ample protection for the Petitioners and their representation by counsel is adequately protected. The witnesses are available to Petitioners and the testimony of such witness before the grand jury, if he testifies at the trial, is available for impeachment purposes. The other evidence sought, if any, was not in Respondent's possession or control, or can be obtained by bills of particulars. There is no adequate basis presented for violating the need for grand jury secrecy in the manner attempted by Petitioners.

Respondent respectfully contends that the answers to the questions are clear and that any further consideration would be unnecessary. Respondent respectfully contends that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

BOSTON E. WITT
Attorney General for the State of New Mexico

JAMES V. NOBLE
Assistant Attorney General State of New Mexico

Attorneys for Respondent State of New Mexico.